IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 50 of 1999.

Judgement reserved on: 18.4.2007.

Date of decision: 8.5.2007.

Smt. Kanchan Sood ….. Appellant.

Vs.

Municipal Corporation, Shimla …. Respondent.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellant : Mr. Dushyant Dadwal, Advocate.

For the Respondent : Mr. Shrawan Dogra, Advocate.

Kuldip Singh, Judge.

The plaintiff is in appeal against judgement, decree dated 5.10.1998 passed by the learned District Judge, Shimla in Civil Appeal No. 55-5/13 of 1996 dismissing the appeal of the plaintiff against the judgement, decree dated 26.9.1996 of learned Sub Judge Ist Class (II), Shimla. The parties in the judgement are referred in the same manner as in the trial court.

2. The brief facts are that defendant in July, 1985 invited applications for allotment of shops in the proposed Pandit Padam Dev Commercial Complex, Shimla, on the terms and conditions mentioned in the brochure. The applications were originally invited for 70 shops on first come first serve basis or draw of lots in case the number of the applicants exceeded the shops available.

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?***

3. The plaintiff, on 4.10.1985, vide application No. 2338, registration No. 39 alongwith bank draft of State Bank of India No. 891995 applied for allotment of shop. The plaintiff deposited Rs. 15,000/- at the rate of Rs. 5,000/- per preference for shops in upper storey. The defendant vide letter dated 30.10.1989, informed the plaintiff that the allotment of shops was not possible and the amount of Rs. 10,000/- was returned to the plaintiff alongwith interest which amount was again sent to the defendant by plaintiff, vide her letter dated 19.11.1989.

4. In November, 1991, Mayor of the defendant corporation invited the plaintiff and other persons for negotiations when ten shops each in both floors were ready. There were in all ten applicants including the plaintiff, who informed the Mayor the number of the preferential shops to be allotted to each of them and as per mutual settlement, shops No. 9 and 10 converted into one shop was opted by Master Manu Bhardwaj and Miss Megha Bhardwaj. The plaintiff deposited Rs. 39,040/- rent on 20.11.1991 and Rs. 5,000/- on account of the preferential money. Thereafter again a sum of Rs. 10,000/- was paid on 30.11.1991 on account of preferential money for top floor of Pandit Padam Dev Commercial Complex. The allotment was to be held on 30.11.1991.

5. The plaintiff has alleged that act of the defendant corporation for keeping aside the allotment of two shops in the upper floor of the complex was illegal, unwarranted and the corporation had no right to withdraw the allotment of said shops. These two shops i.e. shops No. 9 and 10 (combined into one shop) were not allotted

intentionally as the same were to be allotted to some influential persons. It has been alleged that in total defiance of the agreement between the parties, the defendant did not allot the said shops and the plaintiff who had deposited Rs. 15,000/- on account of three preferences deposits, was not allowed to opt for three preferences and instead the defendant was given the possession of shop No.10 in the first floor. The plaintiff has alleged that defendant has decided to auction the different portions of the said complex including two shops in upper floor to different persons, which is in violation of agreement and brochure and hence any auction of the aforesaid shops in the upper floor would be null and void. The plaintiff is entitled to possession and allotment of one shop in the upper floor. On these grounds the plaintiff filed a suit for permanent prohibitory injunction restraining the defendant from holding auction on 30.9.1992 or any other date with respect to the shops situated in upper storey of Pandit Padam Dev Commercial Complex, Shimla and to handover the possession of the said shops to any other persons except the plaintiff.

6. Defendant has contested the suit by filing written statement, in which several preliminary objections have been taken. On merits, it has been submitted that interested persons were required to deposit Rs. 10,000/- as registration deposit for one shop and for particular shop/ floor location an amount of Rs. 5,000/- by way of preference is required to be deposited. The plaintiff got herself registered for one shop. She deposited Rs. 45,000/- and Rs. 5,000/- as preferential amount for one shop on 20.11.1991. The plaintiff sent Rs. 10,000/- by way of two drafts by post with application dated

29.11.1991. These drafts were received in the office of the defendant on 30.11.1992. There was no mention as to against which shop/ floor these deposits have been made. The amount Rs. 10,000/- sent by plaintiff was deposited in defendant's treasury on 7.5.1992 towards future rent of shop allotted to her.

7. It has been submitted that there was no assurance of the Mayor with regard to availability of the shop on top floor. The plaintiff deposited Rs. 39,040/- as rent, vide receipt dated 20.11.1991 and Rs. 5,000/- on account of preferential amount for one shop on 20.11.1991. The plaintiff applied for allotment of one shop and deposited security and preferential amount for one shop, which was allotted to her by draw of lots on 20.11.1991.

8. The learned Sub Judge Ist Class (III), Shimla dismissed the suit on 26.8.1996, against which plaintiff filed an appeal, which has also been dismissed by learned District Judge on 5.10.1998. Thus the plaintiff has filed the appeal in this court.

9. I have heard the learned counsel for the parties and have also gone through the record.

10. The appeal has been admitted on following substantial questions of law:

1. Whether the learned District Judge was right in rejecting the application under Order 41 Rule 27 of the Code of Civil Procedure when the document sought to be produced went to the root of the case and there could be no doubt about its authenticity?

2. Whether both the learned courts below were right in ignoring that the respondent was barred by principles

of promissory estoppal from withholding the allotment of the shop in the suit?

3. Whether both the courts below have erred in law in holding that there was no right vested in the appellant to sue the respondent for the allotment?

4. Whether the judgement and decree of both the courts below is vitiated by mis-reading of the evidence and documents on record?

5. Whether both the courts below erred in law in not considering the pleadings and evidence on the record and delivering the judgement on an entirely new case which was neither completed nor proved before the learned court below?

Substantial question of law No.1:

11. The plaintiff wanted to prove by way of additional evidence a letter dated 26.11.1991 allegedly written by Mayor of defendant corporation. In the application, it has been alleged that the plaintiff was not aware of the factum of the existence of the letter dated 26.11.1991 from Mayor to Commissioner. It has been alleged that production of the said letter is important for the proper adjudication of the case. The additional evidence, as per Rule 27 of Order 41 of the Code of Civil Procedure, is permissible only after fulfilling the following requirements:-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgement, or for any other substantial cause,

12. The additional evidence which plaintiff wanted to produce does not fall in clause (a), or (b) supra. Therefore, additional evidence application is to be considered under clause (aa) supra. In the application for additional evidence, the plaintiff has not pleaded that notwithstanding the exercise of due diligence, such evidence was not within her knowledge and for that reasons she could not produce that evidence earlier. As per clause (aa) ignorance of evidence in itself is not sufficient for seeking permission for additional evidence. The applicant is required to allege and establish due diligence also. The plaintiff in the present case has neither alleged nor established due diligence on her part.

13. The learned District Judge otherwise has rightly held that the additional evidence sought to be adduced by the plaintiff has no relevance as the allotment was made by the Commissioner according to his own procedure despite Ex. P-5 understanding of the applicants for allotment of shops. This shows that arrangement was not accepted by the Commissioner and which was within the knowledge

of the plaintiff. The learned District Judge has rightly dismissed the application made under Order 41, Rule 27 CPC for leading additional evidence. Hence, substantial question of law No.1 is decided against the plaintiff.

Substantial questions of law No. 2 to 5:

14. The plaintiff in para- 5 of the plaint has pleaded, as under:-

> ".....In pursuance of the said discussion, the applicants who were 10 in number including the present plaintiff informed the Mayor about the preferential number of shops to be allotted to each of them and as per the said mutual settlement and as per the mutual settlement the shops No. 9 and 10 and presently converted into one shop was opted by Master Manu Bhardwaj and Miss Megha Bhardwaj."

15. The plaintiff in plaint has prayed that the defendant corporation be restrained by way of permanent prohibitory injunction for holding any auction on 30.6.1992 or any other date with respect to shops (at present one shop combining two shops) situated in the upper storey of Pandit Padam Dev Commercial Complex. On one hand, the plaintiff has pleaded that as per the understanding the shops No. 9 and 10 were to be given to Master Manu Bhardwaj and Miss Megha Bhardwaj, but simultaneously she has prayed decree of permanent prohibitory injunction restraining the defendant from auctioning these shops. There is inherent contradiction in the claim of the plaintiff, irrespective of the stand of the defendant corporation regarding the allotment and auction of the shops. Atleast plaintiff has no locus-standi to challenge the auction of these shops, once it is her

case that these shops agreed to be allotted to Master Manu Bhardwaj and Miss Megha Bhardwaj.

16. The plaintiff has accepted the allotment of shop No. 10 in the lower storey without any objection. This shop was allotted to her on 30.11.1991. This is not the case of the plaintiff that she did not accept the allotment of the shop on the lower story or she has accepted the allotment under protest. Once the plaintiff has accepted the shop in the lower storey without objection, she is estopped from challenging the allotment on the ground that she had taken three preferences for allotment of the shop on the top floor and only one preference was considered and other two were not taken into consideration. She can not re-open the case of the allotment of the shop in the lower storey. She cannot claim two shops one on the top floor and other on the lower floor as she had applied for allotment of one shop only. It is a different thing that mutual settlement submitted to the Mayor in writing vide Ex. P-5 was not accepted and approved by the Commissioner, Municipal Corporation, Shimla.

17. The learned counsel for the plaintiff has failed to point out how the defendant is barred by the principles of promisory estoppal from withholding the allotment of shop in question. The plaintiff has failed to make out any case that she has any vested right in a particular shop. There is no mis-reading of the documents and pleadings in the impugned judgement. The two courts below have decided against the plaintiff. The learned counsel for the plaintiff has otherwise failed to specifically point out how the first appellate court has mis-read the pleadings and evidence in the impugned judgement

and decree. The lower appellate court has rightly appreciated the material on record. In fact, the plaintiff has failed to make out that any substantial question of law in the appeal. The substantial questions No. 2 to 5 are accordingly decided against the plaintiff.

18. In view of above discussion, the appeal is dismissed. The impugned judgement and decree are upheld. No costs.

May 8 , 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**